

# **The Implications of Applying the Torrens System to Samoan Customary Lands: Alienation through the LTRA 2008**

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## Introduction

In 2008, the Government of Samoa passed the Land Titles Registration Act (LTRA), which introduces the Torrens system, in particular the principle of indefeasibility, to the registration of lands in Samoa, including customary land leases. The Torrens system affirms the validity of a titleholder except in a case of fraud, so that a would-be-purchaser for value without notice is not obligated to look behind the title. Except in a case of fraud, a true owner who is deprived of his/her land as a result is entitled to compensation. Section 2 (1) defines a customary land lease as ‘a customary land lease interest held in accordance with Article 102 of the Constitution and the Alienation of Customary Land Act 1965.’ Before, during, and even after it was passed, the LTRA has been highly controversial.

Years before it was passed, there were fears expressed that it would lead to the alienation of customary lands. As early as 2006, the Samoa Party publicly declared, ‘*the HRPP (Human Rights Protection Party) government was secretly planning, if it is returned to power, to register Customary Lands under the Torrens Land Registration System, under individual ownership which is alien to the Faa-Samoa and will Alienate (separate and remove) our lands from the Customary owners of that land.*’<sup>1</sup> There were no counter claims to this, but soon after the HRRP was elected, in 2006, the Land Titles Registration Bill was introduced into parliament, and concerns about the alienation of customary lands continued to surface. Guy and I discussed the Bill, and he warned that if passed, the Samoan people would need to constantly check the land register to make sure the records were accurate. He also said that it was one of the worst pieces of drafting he had ever seen; it had a number of loopholes which could be exploited against the interests of customary land owners. I agreed. Wherever I have presented on this

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<sup>1</sup> Su’a Rimoni Ah Chong. 2008. ‘Samoa Party Didn’t Misunderstand Bill’ (17 May 2008) *Samoa Observer*. Words in brackets are mine.

topic, I always mention our conversation, and in particular these two points, in the hope that if people would not accept the warning about the LTRA from me, they might from a longtime scholar and friend of the Pacific.

The LTRA came into force in March 2009,<sup>2</sup> and ten years later, the issue of alienation of customary lands remains unresolved. In July, 2016, the Samoa Law Society and Te Hunga Rōia Māori o Aotearoa (the Māori Law Society) held a joint conference in Apia, Samoa, where the former Samoan Attorney General, Aumua Ming Leung Wai, presented a paper entitled, *'Promoting the economic use of customary land – Does the mortgaging of leasehold interests over customary land result in alienation of customary land prohibited by the Constitution?'*<sup>3</sup>

The persistence of this issue is hardly surprising. Approximately 80 percent of lands in Samoa are under customary land tenure, and these play a central role in the Samoan socio-political system; all chiefly titles are attached to customary lands. Any hint of customary land alienation raises concerns among Samoans. Within this context, widely publicized narratives have compared the possible implications of the LTRA to the loss of customary lands in New Zealand under similar legislation.<sup>4</sup> In a 2008 interview, the then President of the Samoan Umbrella for Non-Government Organizations (SUNGO) stated that the Land Titles Registration Bill was similar to a New Zealand law that saw Maori removed from their property.<sup>5</sup> A 2009 legal analysis of the LTRA by Wellington lawyer, Ruping Ye, argues that if combined with the Samoa government's power to take customary lands for public purposes, *'The operation will be like New Zealand's conversion of customary land into freehold land in the early settlement days, through the Crown's pre-emptive right to purchase lands from Maori, and sell them to settlers.'*

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<sup>2</sup> Ruping Ye, 'Torrens and Customary Land Tenure: A Case Study of the Land Titles Registration Act 2008 of Samoa', *VUWLR*, Vol. 40, (2009), 827.

<sup>3</sup> Aumua Ming Leung Wai, *'Promoting the economic use of customary land – Does the mortgaging of leasehold interests over customary land result in alienation of customary land prohibited by the Constitution?'*, Paper presented at Samoa Law Society/Te Hunga Rōia Māori o Aotearoa Joint Conference: 'Where is our Island? – Navigating the waves of custom and law – Finding ourselves in our Islands', 7-10 July 2016, Apia, Samoa.

<sup>4</sup> This refers to the New Zealand Land Transfer Act 1952.

<sup>5</sup> Maggie Tait, 'Customary land Excluded from Samoa Bill' (2008) *New Zealand Herald*. Available online at: [http://www.nzherald.co.nz/world/news/article.cfm?c\\_id=2&objectid=10509553](http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10509553).

*The consequences have been devastating in New Zealand, causing a century's grievance to the native people and disturbance to the development of the nation.*<sup>6</sup> The Samoa government has consistently denied claims of alienation, and shortly before the LTRA was passed, inserted additional provisions (Sections 9.4 & 9.5) to prevent any possibility of this happening. These have not allayed fears or appeased the critics.

Arguably, the issue of whether the LTRA provides for the alienation of customary lands hinges on whether the LTRA applies the concept of indefeasibility of title to these. The Government of Samoa has consistently argued that it does not. This paper argues that it does. The passing of the Land Titles Registration Amendment Act (LTRA) 2015, intended to close any loopholes that would allow for alienation, suggests that the government's position on alienation since 2008 was premature at best, erroneous at worst. This paper examines the LTRA, existing legal analyses, recent legislation, and subsequent amendments in order to address whether the LTRA could alienate the allodial title to customary lands from its owners, which are the *aiga* (current and future members of an extended family) or *nu'u* (village/polity). The paper will examine the political and legal avenues by which the LTRA provides for the alienation of Samoan customary lands.

### Land in Samoa

In 2015, 85.3 percent of lands in Samoa were held as 'Customary land', 1.2 percent were held as 'Leased customary land', 1.2 percent were held as 'Leased government land', 10.8 percent were held as 'Own freehold land', 0.8 percent were held as 'Leased freehold land', and 0.7 percent were listed as 'other'.<sup>7</sup> The Constitution defines customary land as 'land held from Western Samoa in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage.' (Section 101.2)<sup>8</sup> Time and space do not permit a discussion of what constitutes custom and usage, which varies in terms of how these are understood and applied at the national level (often referred to as) and at the local level (often referred to as *aga i fanua*), which can mean

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<sup>6</sup> Ruping Ye, above n 2.

<sup>7</sup> Government of Samoa. 2016. *Agricultural Survey 2015 Report*. Apia, Samoa: Samoa Bureau of Statistics., p.3.

<sup>8</sup> The Land and Titles Act 1981 provides a similar definition, but also sets out how freehold and public lands can be made customary.

the approximately 330 villages in Samoa, or the districts they form. Each village has the power to define what their customs and traditions are, within parameters specified by the Constitution, and the Village Fono Act 1990.

Customary lands are integral to the Samoan traditional political system (*faamatai*), which is part of Samoan culture or way of life in general (*faaSamoa*). The basic socio-political unit is the *aiga*, whose key resource, apart from its members, is lands. *Aiga* are led by *matai* (heads of families), who ultimately determine the distribution and use of these lands. A person becomes a *matai* when an *aiga* allocates to him/her a *suafa* or a *matai* title (a title given to the head of an *aiga* (extended family)), and from thereon he or she assumes authority and control over the customary lands attached to the *suafa*, among other things.<sup>9</sup> This authority/control is partial in cases where the *suafa* is shared between more than one person. The *matai* and the *aiga* have a fiduciary relationship in respect of this land; the *matai* has legal ownership, but the *aiga*, of which the *matai* is also a part, is the beneficial owner. The *aiga* possesses the *suafa* in perpetuity, and therefore it is the ‘*aiga* in perpetuity’ that possesses the allodial title to the attached lands. The *aiga* includes both its current members and its future generations, and both hold ownership rights to the attached lands.

Aside from their socio-political significance, customary lands are also important for other reasons. In 2015, out of a total of 28,119 households, 27,411 (97 percent) were agricultural households (these grew crops or raised some livestock).<sup>10</sup> There were 23,877 households in the category defined as ‘major crop households’. These possessed ‘more than 625 square yards of land for garden crops; or more than 20 coconut trees; or more than 20 banana plants; or more than 20 other tree crops.’<sup>11</sup> Of these, 85 percent were using their own customary lands, down from 94 percent, in 1989. In terms of the number of parcels of major crop households by land tenure, out of 46,026 parcels, 39,253 were those on customary lands. By comparison, there were 4946 of freehold land parcels, 571 of leased customary lands, 537 of leased government land, 383 of

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<sup>9</sup> Suitability is often determined by a candidates previous service to their *aiga*. This has changed somewhat; future service now also counts. The importance of service as a channel to leadership is expressed in the Samoan proverb, *o le ala i le pule, o le tautua* (the way to authority is service).

<sup>10</sup> Government of Samoa, (2016) *Agricultural Survey 2015 Report*, 1.

<sup>11</sup> Above n 10.

leased freehold land, and 326 in the category of 'Other'.<sup>12</sup> A substantial proportion of the population remain highly reliant on customary lands.

Given the centrality of customary lands to Samoan life, it is little wonder that these are afforded extra constitutional protection. Section 102 of the Constitution prohibits the alienation of customary lands. It states:

*It shall not be lawful or competent for any person to make any alienation or disposition of customary land or of any interest in customary land, whether by way of sale, mortgage or otherwise howsoever, nor shall customary land or any interest therein be capable of being taken in execution or be assets for the payment of the debts of any person on his decease or insolvency:*

*Provided that an Act of Parliament may authorize-*

*(a) The granting of a lease or license of any customary land or of any interest therein;*

*(b) The taking of any customary land or any interest therein for public purposes.*

Section 109 requires a two-thirds majority in a national referendum, in addition to a two-thirds majority in parliament, in order to change section 102.

### The Land Titles Registration Act 2008 and the Torrens System

Up until 2009, when the LTRA was enforced, public and freehold lands were registered under the Deeds Conveyance System. Registration under the Deeds system establishes title by the instruments registered in the national land register. The person who registers the superior instruments when laying claim to property is considered the true owner. Ye argues that the Samoan system was not purely Deeds; there were elements of the Torrens system included. The Torrens system establishes title to land by registration. A key feature of the Torrens system is indefeasibility; the person that has his/her name registered on the title is considered the true owner, regardless of any infirmities in his/her title. The exception to indefeasibility is fraud. The Courts may revert the title to

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<sup>12</sup> Above n 10, 6.

the true owner when fraud was involved in the registration. However, fraud can be hidden if a bona fide purchaser for value without notice (of the fraud) subsequently acquires the title. The true owner may receive compensation for their loss.

The Deeds system provides greater security to the true owner. It is incumbent on any would-be-purchaser to do his/her homework to establish whether the title he/she was acquiring has infirmities. If the would-be-purchaser does not, he/she takes the risk that a subsequent registration of superior instruments by another person would defeat their claim of ownership. Conversely, the Torrens System provides more security for a would-be-purchaser, and less for the true owner, because of the indefeasibility of title principle. Therefore, a would-be-purchaser must only concern himself or herself with the person whose name is on the title. This reflects two key principles of the Torrens system: the mirror principle (the registered title accurately reflects the interests pertinent to the land in question) and the curtain principle (a would-be purchaser does not need to and in fact should not look behind the name that is registered on the title).<sup>13</sup> The onus is placed on owners of land to ensure that the register of titles is accurate. This requires constant monitoring to prevent an erroneous owner registering his/her name on the title. A would-be-purchaser is relieved of the homework duty, and receives certainty of title.

#### *Controversy at the Bill stage*

In 2006, public concerns were raised that the Samoan government would adopt and apply the Torrens system of land registration to customary lands. In September, that year, O le Siosiomaga Society (OLSSI), a local non-government organization, claimed that the government would release a land bill that would introduce and apply the Torrens Land system to customary lands. OLSSI also warned that this system would conflict with customary land tenure principles and practices. It urged village mayors (*Sui o le malo*)<sup>14</sup> to inform their constituents and make public enquiries about this matter.<sup>15</sup> In the same year, the Samoa Party published an election manifesto which stated, 'the HRPP government was secretly planning to register Customary Land under

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<sup>13</sup> Above n 12, 851-2.

<sup>14</sup> These were formerly known as *Pulenu'u*.

<sup>15</sup> Personal research, interviews conducted in 2006, Samoa.

the Torrens Land Registration System', if it was returned to power.<sup>16</sup> The then leader of the party, Su'a Rimoni Ah Chong, expressed concerns that the Torrens system would conflict with customary land ownership principles, particularly the principle and practice of communal land ownership under the trusteeship of *matai* (heads of families), as opposed to individual land ownership.<sup>17</sup> There was no evidence of collusion between these various actors.

These marked the beginnings of a strong but uncoordinated opposition to what emerged as the Land Titles Registration Bill. The Samoa Umbrella for Non-Government Organizations (SUNGO) publicly opposed the Bill.<sup>18</sup> Fearing that the Torrens system would undermine Samoan customary land tenure, they appealed to the government, 'with the interest of all the Non-Government Organizations and Civil Based Societies', to amend the Bill so that it would be in line with 'the Customs and Traditions of Samoa'.<sup>19</sup> SUNGO formed a sub-committee, Komiti e Puipuia Eleele Tau Samoa (KPETS), to highlight and address issues with the Bill. KPETS subsequently published a statement detailing how the Torrens system was incompatible with, and a threat to Samoan customary land tenure practices.<sup>20</sup> In May 2008, it challenged the Prime Minister and the Attorney General to a public debate on this matter.<sup>21</sup> A former Minister of Parliament, Le Tagaloa Pita, made a similar argument: he stipulated that the Bill would lead to an 'alienation of Customary Land' and that it was 'contrary to the provisions' of the Constitution.<sup>22</sup> Asiata Saleimoa Vaai, the then leader of the Samoa Democratic United Party (SDUP) expressed a desire to launch a legal challenge to the Act.<sup>23</sup> The fact that very similar concerns were expressed by different and apparently unconnected sources suggested there was substance to the criticism; usually, where there is smoke, there is fire.

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<sup>16</sup> Above n 15.

<sup>17</sup> Above n 15.

<sup>18</sup> 'Land Bill UnSamoan: SUNGO' (10 March 2008) *Samoa Observer*.

<sup>19</sup> Above n 18.

<sup>20</sup> 'Land Bill Opponents Call for Referendum' (2 May 2008) *Samoa Observer*.

<sup>21</sup> Ah Mu, A, 'Anti-land Bill Group Wants Debate' (9 May 2008) *Samoa Observer*.

<sup>22</sup> Pita Le Tagaloa, 'Land Right a Basic Human Right of Samoan' (4 May 2008) *Samoa Observer*.

<sup>23</sup> 'Asiata to Challenge Land Bill' (3 July 2008) *Samoa Observer*.

Specifically, opponents to the Bill criticized it on a number of grounds. First, it was argued that under the Torrens land system, customary lands would be registered under individual ownership titles, as opposed to *matai* titles,<sup>24</sup> and that this was unconstitutional. According to SUNGO, this would lead to ‘personal private property registration’, which conflicted with traditional principles and practices whereby Samoan customary lands were not to be held under private-property rules and principles.<sup>25</sup> Instead, the person recorded as the owner assumed a position similar to a trustee; he/she was the legal, but not the sole beneficial owner. According to SUNGO, this principle would not be upheld under a Torrens land system of registration.<sup>26</sup> Ah Chong (2008) made a similar claim; the Bill would allow for ‘the registration of the Customary lands in individual names of people’, and thereby was inconsistent with Section 102 of the Constitution. He argued that registering individual names rather than a *matai* title, would alienate the land from its rightful owner because land is owned by ‘*Matai* Titles’, and ‘Once you separate the Land from the *Matai* Title, you are ALIENATING it from its owner.’<sup>27</sup> These arguments were predicated on a number of assumptions, but key among these was that the Bill introduced and applied the Torrens land system to Samoan customary lands. This became a point of contention between opponents of the Bill, and the government.

Second, it was argued that the Bill could not guarantee the integrity of the registration process. Critics noted that the Bill provided the Registrar with ‘wide discretionary powers to manage the system’, while failing to provide appropriate checks and balances for this position.<sup>28</sup> Notably, the Registrar would have ‘discretion in the Bill to make changes to the Folio at any time with or without notifying and affirming that changes were made with the concerned parties.’<sup>29</sup> A folio is a record of the interests over a particular piece of land (LTRA 2008, Section 10). At the same time, the Bill indemnified those managing the system, stipulating, ‘the Ministry shall not be liable to any action or proceedings for or in respect of any act or matter done or omitted to be

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<sup>24</sup> Ah Chong (2008); ‘Reject Land Bill SUNGO Urges’ (7 April 2008) *Samoa Observer*.

<sup>25</sup> (10 March 2008) *Samoa Observer*.

<sup>26</sup> Personal research, Interviews, Samoa, Jan-Feb 2008.

<sup>27</sup> Ah Chong 2008.

<sup>28</sup> (7 April 2008) *Samoa Observer*.

<sup>29</sup> Above n 28.

done in good faith.’<sup>30</sup>The Bill did not define ‘In good faith’. Critics argued this opened the way for corrupt, fraudulent, and unfair registrations,<sup>31</sup> particularly as the Bill also contained vague terminology that could be misconstrued and/or manipulated, such as, ‘as the Registrar sees fit’ or ‘the Registrar may assume’ or ‘may refuse.’<sup>32</sup>

Finally, it was argued that the Bill would undermine Samoa’s traditional socio-political system and could lead to instability. Critics contended, ‘Family, village and district cohesiveness and functioning will be negatively impacted. Community values of cooperation and looking after one another will also suffer.’<sup>33</sup> Elsewhere, KPETS argued that the Bill ‘is capable of destroying the underpinnings of Samoan society and village functioning’ because it encouraged the pursuit of self-interest, rather than the interests of the community.<sup>34</sup> Rightly or wrongly, critics believed that the registration of title under an individual name would undermine the community underpinnings of land ownership, which they believed were better reflected in the Deeds system.

The Government rejected these arguments. Ah Chong notes that in response to the Samoa Party’s claims, the Government had ‘appeared many times on all Television Channels and told the Samoan people that what the Samoa Party was saying was a lie and it will be sued.’<sup>35</sup> The threat never eventuated, although the Prime Minister consistently claimed that customary land was not included in the Bill. In May 2008, for example, the Prime Minister publicly stated that the Bill affected only freehold and public lands, and did not affect customary lands.<sup>36</sup>

There were reasons to doubt the Government’s integrity. Research conducted in Samoa in 2008 revealed inconsistencies in the Government’s position. According to two sources: a local lawyer, and the Chief Executive Officer SUNGO, a public meeting was organized by SUNGO, in February 2007, to discuss the Bill. At the meeting, the then

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<sup>30</sup> Above n 28.

<sup>31</sup> Personal research, interviews conducted in Samoa, 2008.

<sup>32</sup> (7 April 2008) *Samoa Observer*.

<sup>33</sup> Archival research material, KPETS 2008, ‘PowerPoint Presentation – Protection of Customary Land Committee’.

<sup>34</sup> (7 April 2008) *Samoa Observer*.

<sup>35</sup> Ah Chong 2008.

<sup>36</sup> Alan Ah Mu, ‘Bill Will Alienate Land, Anti-land Bill Group Insists’, (14 May 2008) *Samoa Observer*.

Assistant CEO of the Ministry of Natural Resources and Environment (MNRE) admitted that the intention of the Bill was to apply the Torrens Land System to Samoan customary land.<sup>37</sup> The MNRE was one of the key ministries involved with the Bill; the other was the Attorney General's office. There were also inconsistencies and inaccuracies in the Government's narrative. KPETS noted that the term 'customary land' was included in the definitions of land covered in the Bill.<sup>38</sup>

Ironically, the Government's actions, which were intended to allay concerns, served to support these. The Attorney General at the time stated: 'The registration of customary land is ALREADY permitted under our CURRENT laws in two instances.'<sup>39</sup> He was referring to 'leasing or taking for public purpose pursuant to statutory law.'<sup>40</sup> As will be discussed later, this understanding of alienation under the Constitution is highly questionable, because the effects of leasing under a Deeds conveyance system as opposed to a Torrens system are markedly different. It is highly doubtful that the framers of the constitution had leasing under the Torrens system in mind because the Deeds system prevailed at the time. He then went on to say: 'The Bill merely continues the current law in relation to the registration of customary lands'.<sup>41</sup> If the Bill did not affect the leasing of customary lands, then the revisions made shortly before the Bill was passed were curious.<sup>42</sup> Sections 9.4 and 9.5 were added to the Bill. Section 9.4 of the Bill states:

*No provision of this Act may be construed or applied to: (a) permit or imply the alienation of customary land in a manner prohibited by Article 102 of the Constitution; or (b) permit or deem ownership in any customary land to vest in a person otherwise than as determined under any law dealing with the determination of title to customary land.*

Section 9(5) states:

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<sup>37</sup> Interviews, Samoa, June-August 2008.

<sup>38</sup> Ah Mu (14 May 2008).

<sup>39</sup> Alan Ah Mu, 'AG: Land Bill Misunderstood', (11 May 2008) Samoa Observer.

<sup>40</sup> Above n 39.

<sup>41</sup> Above n 39.

<sup>42</sup> Maggie Tait above n 5.

*Nothing in this Act shall permit the exercise of any power or affect any interest in customary land that could have been applied by law prior to the commencement of this Act.*

These amendments were accompanied by further government assurances that the Bill would not apply to customary lands. According to the Attorney General, they were added in order to ‘really clarify that the Bill will not affect the ownership or alienation of customary land.’<sup>43</sup> According to Tait, the then Chief Executive Officer of the MNRE, Tuuu Ieti Taulealo stated, ‘We will only use the new legislation for freehold land and government land.’<sup>44</sup> Common sense suggests that if customary lands were not included in the Bill, up to that point, why was there a need for the additional provisions? In total, the events that preceded the passing of the LTRA show inconsistencies and inaccuracies with the Government’s position, leaving open the question of whether the Bill would apply to customary lands.

#### *The LTRA 2008*

The LTRA applies to customary lands. The term, ‘customary land’ appears in Part 1, Section 2, in reference to its meaning and that of a customary land lease and license. Customary land is part of the register. Part 2, Section 5(1)(l) states,

*the Registrar may maintain a record of customary land showing location, description, details of persons having administrative or trustee responsibilities in respect of the land and such other details as the Registrar sees fit to include.*

Section 5.6 states,

*The record which the Registrar may maintain pursuant to paragraph (1)(l) is separate from and in addition to, the customary land registration required by section 10 of this Act.*

Section 9(1) states,

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<sup>43</sup> Ah Mu 2008, 11 May.

<sup>44</sup> Maggie Tait above n 5.

*Where after the commencement day any land becomes public land, freehold land, or customary land leased or licenced under the provisions of the Alienation of the Customary Land Act 1965, it shall be the duty of the Registrar to include such public land, freehold land or customary land lease or license in the Register.*

Section 9(2) states,

*The Registrar may also include in the Register customary land in respect of which judgment has been made by the Land and Titles Court under the provisions of the Land and Titles Act 1981.*

Sections 9(4) and (5) were retained unchanged. Section 10 instructs the Registrar to ‘create a folio of the Register for land’. The relationship of this section to Section 5.6 is unclear; it does not mention ‘customary land’. It appears that the intention may be to create a separate folio for customary lands, but the wording does not specifically provide for this.

There can be no doubt that the principle of indefeasibility applies to customary lands. Section 9.1 states,

*Where after the commencement day any land becomes public land, freehold land, or customary land leased or licensed under the provisions of the Alienation of the Customary Land Act 1965, it shall be the duty of the Registrar to include such public land, freehold land or customary land lease or license in the Register.*

A lease is a property interest in land, and a customary land lease is a property interest in customary lands. When a customary land lease is registered, it is subject to the principle of indefeasibility contained in the LTRA, sections 32 and 33. The relevant part of section 32(1) states,

*Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded ... .*

The relevant part of section 33 states,

*Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest, shall:*

*(a) be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered; or*

*(b) be required to see to the application of the purchase money or any part thereof; or*

*(c) be affected by notice direct or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.*

Ye notes that these sections correspond with sections 62 and 182 of the New Zealand Land Transfer Act 1952, which provide for indefeasibility in that Act. Sections 32 and 33 will also apply to customary lands registered by way of judgments of the Lands and Titles Court ( section 9(2)).

*Will the Land Titles Registration Act 2008 provide for the alienation of customary land? Ye's analysis*

Ye argues that the LTRA will provide for the alienation of customary lands. Ye examines, 'the interaction of the LTRA 2008 and the existing system of land tenure in

Samoa, with a focus on the impact of the LTRA 2008 on customary land,<sup>45</sup> and argues, ‘the provisions in the LTRA 2008 are either ambiguous or inconsistent with the substantive law on customary land tenure, and the ambiguity, inconsistency and loopholes in the Act will *potentially cause the conversion of customary land into freehold land and render aspects of the LTRA 2008 repugnant to the Constitution of the Independent State of Samoa* (the Constitution).<sup>46</sup> Consequently, Ye recommends that ‘the LTRA 2008 should be amended to expressly exclude the application of indefeasibility of title to customary land.’<sup>47</sup>

Ye makes a number of points that are critical to this analysis. First, Samoa has adopted the Torrens system through the LTRA, the key features of which include the establishment of conclusive ownership of interests in land through registration, and the establishment of a fund to compensate persons who suffer loss as a result.

Second, two mechanisms bring customary lands under this registration system: the conversion of the previous register to the new register, and the registration of new transactions after the LTRA comes into force.<sup>48</sup> These include customary lands leased and licensed under the Alienation of the Customary Land Act 1965, and customary lands that are subject to a judgment made by the Land and Titles Court, for which the Land and Titles Act (LTA) 1981 requires registration. The LTA 1981 requires the Registrar to register every judgment, order and declaration made by the Land and Titles Court.<sup>49</sup>

Third, customary lands could be alienated in two ways. Firstly, in relation to adjudicated customary land, the LTRA apparently makes the registration of judgments compulsory, but leaves the registration of title optional. Furthermore, ‘even if the registration of adjudicated customary land is registration of title, it could still be registered as customary land. If it is registered as customary land, arguably indefeasibility will not apply, because everyone should know customary land is

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<sup>45</sup> Ruping Ye, 2009, 828.

<sup>46</sup> Above n 45.

<sup>47</sup> Above n 45.

<sup>48</sup> Above n 45, 834. This refers to all lands registered under the Land Registration Act 1992/1993.

<sup>49</sup> Above n 45, 844-5.

inalienable, and any dealing will be ruled as fraud which renders the title impeachable.’<sup>50</sup> Secondly, customary lands could be alienated via conversion to freehold land, particularly those held under *pulefa’amau*. According to Ye, this is where ‘the owner has exclusive occupation and usage of land, and the ownership is recognized as that person’s individual right, which can be inherited by the heirs of the registered title holder.’<sup>51</sup> However, the ‘possibility of converting customary land into freehold land applies to all adjudicated customary land’. Customary lands that fall into the category of *pulefa’amau* are especially at risk because of their similarity to ‘individual ownership’; ‘[w]ith the registration of title, the customary land under the *pulefa’amau* will complete its last step of individualization, and freely enter into the open market.’<sup>52</sup> Ye argues, ‘[t]his is possible even in light of the language of the Constitution,’<sup>53</sup> because ‘conversion of the customary land into freehold is not alienation, if the ownership of land does not change hands and rights in customary land are not limited through such conversion. If conversion is not alienation, it is not against the language of the Constitution. As soon as the land is registered as freehold land, article 102 does not apply anymore and the land is alienable.’<sup>54</sup>

Fourth, Ye argues that if customary land were registered, it would ‘more probably’ be under the *matai*’s name, ‘because under the customary law, the *matai* is the title holder.’<sup>55</sup> Although the LTRA provides for the Registrar to register a ‘trust instrument in respect of any customary land registered under the LTA 1981’, the ‘registration of trust with respect to customary land runs against the three principles of Torrens.’<sup>56</sup> This is not surprising; according to Acquaye and Crocombe, ‘no register could ever contain the full complexity of traditional [rights] to land in any Pacific society.’<sup>57</sup> The mirror principle does not apply because the holder of the *matai* title and membership of the *aiga* changes; there is no certainty of trustee and certainty of beneficiary.<sup>58</sup>

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<sup>50</sup> Above n 45.

<sup>51</sup> Above n 45, 849.

<sup>52</sup> Above n 45.

<sup>53</sup> Above n 45.

<sup>54</sup> Above n 45, 850.

<sup>55</sup> Above n 45.

<sup>56</sup> Above n 45, 851. Notably, neither the LTRA or Ye distinguishes between different types of trusts, such as formal and customary.

<sup>57</sup> Ben Acquaye and Ron Crocombe (eds), *Land Tenure and Rural Productivity in the Pacific Islands*. (1984) 150, as quoted in Ye 2009, 852.

<sup>58</sup> Above n 57.

The application of the curtain principle is also problematic. According to Ye, section 33 of the LTRA, ‘specifies that knowledge that a ‘trust or unregistered interest is in existence’ is not fraud’, and ‘trust includes registered trust, as opposed to trust as a type of unregistered interest.’<sup>59</sup> Ye argues, ‘purchasing the land with the knowledge of a registered trust may still not constitute fraud, as is the case in purchasing the land with the knowledge of unregistered interest. This may be so even where there is some dishonesty involved.’<sup>60</sup> Therefore, the practical effect of sections 32 and 33 would constitute alienation, breaching the substantive law, and therefore be illegal, but the bona fide purchaser’s title will still be unimpeachable.

Regarding compensation where fraud is involved, ‘If the *aiga* lose their land, they would not be able to get it back, and their only possibility of redress would be to get government compensation.’<sup>61</sup> The problem is that although the *aiga* will get money, ‘customary land is valuable to the society in many aspects, and is not measurable by money.’<sup>62</sup> Moreover, ‘adjudicated customary land will not be covered in most situations, ‘because, ‘Section 79(2)(e) specifies that ‘the loss or damage [arising] from the breach by a registered proprietor of any trust’ cannot be compensated by the government.’<sup>63</sup> In total, there is no protection against breaches of trust; a *matai* who is the registered proprietor could alienate the land and the beneficiaries will not be compensated by the government.

According to Ye, beneficial owners could be deprived of their rights in a number of other ways. Firstly, the Registrar does not have the power to register a caveat on a registered trust. Therefore, although ‘[t]heoretically, the beneficial owners can apply for a caveat under s 51, ... since the caveat is by application, the protection on beneficial owners is not as complete and effective as an automatic Registrar’s caveat.’<sup>64</sup> Secondly, a bona fide purchaser or mortgagee has unimpeachable title even if it was obtained from a vendor or mortgagor who was registered as proprietor through fraud, error, or by

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<sup>59</sup> Above n 57,853.

<sup>60</sup> Above n 57.

<sup>61</sup> Above n 57.

<sup>62</sup> Above n 57.

<sup>63</sup> Above n 57.

<sup>64</sup> Above n 57, 854. Notably, the registration of trust is not compulsory.

means of a void or a voidable instrument. Ye argues that section 35(2) of the LTRA is identical to s 183 of the Land Transfer Act in New Zealand, and under the latter, the statutory protection mechanisms could be subverted ‘by the simple device of selling the property to a third party.’<sup>65</sup>

With reference to adjudicated customary land, Ye concludes that registration of a trust instrument cannot protect the *aiga*’s interest. Furthermore, the Torrens system has, ‘caused major injustice to the indigenous peoples who practice customary land tenure’, and ‘Samoa should be wary of this consequence.’<sup>66</sup> Moreover, ‘The LTRA 2008 does not have a coherent protection mechanism to match its substantive law; the application of indefeasibility arguably will destroy the customary land owner’s interests more quickly than it has in New Zealand.’<sup>67</sup> Ye acknowledges that the LTRA is open to a different interpretation.

#### *Issues with Ye’s analysis*

Although Ye provides a compelling argument for why the LTRA could lead to alienation as prohibited by the Constitution, this paper argues that alienation is unlikely to occur through the sale and purchase of customary land. First, it is doubtful that the Government of Samoa would allow this to happen. Their intentions regarding the LTRA are important. With the exception of the Australian law firm that drafted the LTRA, most if not all people involved in the enactment and enforcement of it are enmeshed in customary land issues on a personal level. When the LTRA was enacted, 47 of the 49 members of parliament had to be *matai*. The Attorney General who oversaw the passing of the LTRA holds a number of *matai* titles. Therefore, they understand, or at least should understand, the corrosive implications of land alienation on the Samoan socio-political system, otherwise known as the *fa’amatai*. *Matai* titles are attached to customary lands, and therefore customary lands are integral to the *matai* system, both at the local level and at the national level where positions in parliament

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<sup>65</sup> Ibid., quoting Boast, ‘The Implications of Indefeasibility for Maori Land’, above n 168, at 101.

<sup>66</sup> Ibid., 856.

<sup>67</sup> Ibid., 854.

are restricted to *matai*.<sup>68</sup> Unless they intended to undermine their own positions, and that of their *aiga*, by subjecting customary lands to alienation, it is likely they did and do not intend the LTRA to have this effect.

To be sure, the possibility that the Government intended or intends to alienate customary lands through sale and purchase cannot be ruled out. However, there are a number of factors that suggest this was not the case. Sections 9(4) and (5) were added shortly before the LTRA was enacted, to ensure conformity with section 102 of the Constitution. Secondly, the Government passed the LTRAA to block any possibility of alienation.<sup>69</sup> Section 2 of the LTRAA restricts the entry of customary lands to a ‘record’, as opposed to a ‘registration.’ According to Aumua Ming Leung Wai, these moves counteract the alienation of customary lands through sale and purchase.<sup>70</sup>

Even if the government intended to allow for the alienation of customary lands, through sale and purchase, it understands, or at least should understand, that this is near impossible, given section 109 of the constitution. Notably, if any government has had the power to change section 102 so as to allow for alienation, it is the HRPP. It has been in power since 1988, and currently holds 47 of the 50 seats in parliament. The fact it has not sought any such change is, perhaps, testament of its intentions, or lack thereof, regarding the sale and purchase of customary lands.

Second, a would-be-purchaser is unlikely to see the sale and purchase of customary lands as a viable option. The constitutional restrictions on selling and purchasing customary lands are clear. A would-be-purchaser would have to find ways, such as those outlined by Ye, in order to make it work. However, as Ye notes, these avenues are only possibilities. The sale and purchase of customary lands poses a significant risk to a would-be-purchaser. While it cannot be ruled out, it is notable that none have done so since the LTRA was enforced. It is highly unlikely that alienation of customary lands by sale and purchase, as argued by Ye, is on the cards.

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<sup>68</sup> Even if these members were not *matai*, it would be highly surprising if any were/are not aware of how customary lands factor into Samoa’s socio-political system.

<sup>69</sup> Personal research, interview with the former Auditor General, Aumua Ming Leung Wai, Samoa 2016.

<sup>70</sup> Personal interview, Samoa, September 31, 2016.

### *Alienation by leasing*

What is more likely to occur is alienation by leasing. Defining alienation is problematic in the Samoan context. According to Ye, “Alienation and disposition are not defined in the Constitution, Alienation of Customary land 1965, Alienation of Freehold Land 1972, the LTA 1981 or the LTRA 2008.”<sup>71</sup> The term alienation suggests some form of sale and purchase of the property in question. According to Ye, “The definition of alienate is “transfer ownership of (property rights) to another”, and the definitions of alienation in comparable jurisdictions, such as New Zealand and Niue,<sup>72</sup> both “point to disposition of property rights to another person.”<sup>73</sup> However, in the Samoan context, limiting the definition in this way is difficult to justify.

Section 102 of the Constitution recognizes leasing as a form of alienation, albeit one that is allowable. Corrin (2008)<sup>74</sup> discusses how customary lands may be “taken out of the customary system”, and she considers leasing and licensing as forms of alienation that are constitutionally acceptable. She states:

*However, there are three ways in which land may, in effect, be taken out of the customary system. The only direct means of alienation is by compulsory acquisition under the Taking of Lands Act 1964. Another way is by granting a lease or a license under the Alienation of Customary Land Act 1965. Compulsory acquisition and leasing or licensing are stated by the Constitution to be exceptions to the bar on alienation or disposal. Another way is through registration of authority over land (pulefa'amau).<sup>75</sup>*

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<sup>71</sup> Ibid., p. 849.

<sup>72</sup> Samoa, New Zealand, and Niue share common legal traditions inherited originally from England. Samoa and Niue adopted many of New Zealand’s laws as colonies of the latter, before gaining independence in Samoa’s case, in 1960, and free association in Niue’s case, in 1974.

<sup>73</sup> Ye 2009, pp. 849-850.

<sup>74</sup> Corrin, Jennifer. 2008. “Resolving Land Disputes in Samoa”, in AusAID, *Making Land Work - Volume Two: Case Studies in Customary Land and Development in the Pacific*, Canberra: AusAID.

<sup>75</sup> Ibid., p. 204. According to Corrin, the Courts accept that registration of customary lands under an individual name gives the holder “exclusive rights of occupation and use of the land, which may be inherited by the heirs of the registered titleholder. In other words, it is treated as freehold land.”

These are all ways that land rights can be disposed of or transferred. Although section 102 provides for leasing as an acceptable form of alienation, leasing under the LTRA, and in particular its indefeasibility provisions (sections 32 and 33) are not provided for under the Constitution, for reasons stated hereafter.

The Government intended to allow for the leasing of customary lands under the LTRA, which is why it provides for the registration of leases, and mortgages. The LTRA was intended to create more certainty for all the property rights under its ambit, including customary land leases. Prior to the LTRA, the registration of customary land leases was subject to the same or similar problems as the sale and purchase of lands in general; the principle of *nemo dat* applied, and therefore it was the responsibility of the would-be-purchasers to ensure that the title they were acquiring did not have infirmities. This problem, caused by the *nemo dat* principle, in relation to freehold land, were compounded in relation to customary land leases because of the fluid ownership nature of Samoan customary land. A customary land lease could be overturned if it was later discovered that the lessor had infirmities in his/her title. The LTRA mitigates this risk, in the same way as it is mitigated for sale and purchase of land under the Torrens system in general; a would-be-purchaser of a customary land lease is protected by the mirror and curtain principles. The government guarantees the title, and their lease is indefeasible for the term of the lease.

Technically, the allodial title remains with the *aiga* in perpetuity, but this is complicated in cases where the lease surpasses one or more generations of the *aiga* (a case of this nature is noted below). What might appear straightforward in theory is not in reality. The retention of allodial title is an abstraction, and contrasts markedly with the reality of the *aiga* members who cannot exercise their ownership rights. If and until the leased customary lands are returned to the *aiga*, the latter's allodial title is devoid of substance; the members cannot exercise their ownership rights, unless there are sufficient grounds for cancelling the lease.

Although alienation may not be defined in the Samoan statutes, the definition adopted by related jurisdictions, as noted above, suggest that leasing under certain circumstances would be tantamount to alienation in the form of a 'disposition of

property rights to another person'. Notably, the Te Ture Whenua Maori Act 1993, section 4 defines alienation as:

*(i) every form of disposition of Maori land or of any legal or equitable interest in Maori land, whether divided or undivided; and (ii) the making or grant of any lease, licence, easement, profit, mortgage, charge, encumbrance, or trust over or in respect of Maori land ...*

Under the LTRA, leasing can result in the disposition of property rights to another person. First, a bona fide purchaser for value without notice (of fraud) could acquire an indefeasible title from an erroneous titleholder, thereby acquiring the right to exclude the true owner from his/her land. This could manifest in a number of ways. Firstly, a *matai* could register and lease customary land without the consent, or even knowledge of his/her *aiga*, who are the true owners. Secondly, a *matai* could also register and lease customary land that he/she has no authority over. Although the *matai* might be caught by the fraud exception,<sup>76</sup> in the absence of fraud, the lessee will acquire an indefeasible title.<sup>77</sup> Thirdly, a *matai* could register and lease customary land beyond his/her lifetime, thereby depriving successive holders of any rights over this land. A lease of this kind can and has been made.

In 2008, a 120 year lease was reportedly signed by three villages: Sasina, Fagae'e and Letui, and Jesse James, a Hawaii-based developer and chief executive of South Pacific Development Group.<sup>78</sup> Notably, this contravenes The Alienation of Customary Lands

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<sup>76</sup> LTRA 2008, sections 32 & 33.

<sup>77</sup> Above n 76, section 35.

<sup>78</sup> Radio New Zealand, 'Three Villages on Samoa's Savaii Receive Payments for Land Leases.' (13 July 2010). Available online at: <http://www.radionz.co.nz/international/pacific-news/191373/three-villages-on-samoa-s-savaii-receive-payments-for-land-leases>, accessed 1 Dec., 2016; Tuiletufuga, Nanai Laveitiga, 'Sasina Gets Another \$350,000 Lease Payment', (2013) *Savali*. Available online at: <http://www.savalinews.com/2013/09/18/sasina-gets-another-350000-lease-payment/>, accessed 1 Dec., 2016; PR Newswire. 2008. 'South Pacific Development Group Secures Land Deal for \$450 Million Resort in Samoa', 20 Aug. Available online at <http://www.prnewswire.com/news-releases/south-pacific-development-group-secures-land-deal-for-450-million-resort-in-samoa-64924347.html>, accessed 1 Dec., 2016; Russel, Cindy Ellen, 'Hawaii Company to Build \$450M Samoa Resort' (20 Aug 2008) 13: 233, *Star Bulletin*. Available online

Act (ACLA) 1965, which restricts leases for commercial purpose to 60 years. The ACLA provides for a 30-year lease, with the possibility of a 30-year extension, but no more. The Sasina lease is effectively for 120 years, because it states that at the end of the extension period, if the lessee wishes to enter into a new 30-year lease, the lessor 'shall' agree. This would set in motion another 30-year lease, with the possibility of another 30-year extension. The apparent contravention of the law is perhaps indicative of how flexible property laws could become. Should the Sasina lease be taken to its maximum length, it would deprive two generations of landowners of control over this land, unless there are grounds for cancellation. In cases such as this, a lease under the LTRA could arguably be construed as a form of alienation.

Arguably, this type of lease, and any of the aforementioned scenarios would be in contravention of the Constitution. Corrin states that the Constitution provides for leasing in terms of being an exception to the bar of alienation. Arguably, it does not provide for leasing that constitutes alienation. The 'lease' that is referred to in the Constitution is not the same as what is available under the LTRA, because leasing under the Deeds system was what prevailed during the Constitutional formation period,<sup>79</sup> and is very different to leasing under the Torrens system and the principle of indefeasibility. Under the former, the true owner could reverse an erroneous title registered and leased by someone else, by providing superior instruments to support his/her claim. Under the latter, the third party purchaser would, in certain circumstances, have superior rights, and a lease term of up to 120 years could ensue. Indeed, it is possible that the lease could stretch even further if the terminological gymnastics used in the Sasina lease are employed. Notably, a lessee may require that a lessor pay for any development on the leased land before it is returned. This is another possible route by which a lease is extended indefinitely, or to put it differently, becomes a perpetual lease.

*Does the LTRAA 2015 prevent alienation?*

The former Attorney General, Aumua Ming Leung Wai, intended the LTRAA to close any possible gaps that might still have existed, which would allow for the alienation of

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at: <http://archives.starbulletin.com/2008/08/20/business/story02.html>, accessed 1 Dec., 2016.

<sup>79</sup> Above n 2, 833-4. According to Ye, Samoa had a hybrid system, mixing elements of the Deeds and the Torrens system. However, it is highly doubtful that the principle of indefeasibility was adopted, particularly in relation to customary lands.

customary lands.<sup>80</sup> The effect of the LTRAA is to exclude ‘customary lands’ from registration under the LTRA. However, it maintains the registration of leases and licenses. The LTRAA section 2(a), for example, excludes customary land from the definition of land in section 2(1) of the LTRA, but still includes, ‘registration of licenses or leases of customary land.’ Under section 2, the land register does not include a record of customary land, but the record does not include ‘licenses or leases of customary land.’ The LTRAA’s retention of the registration of customary land leases leaves the door open to the alienation of customary lands by leasing.

### Conclusion

The LTRA provides for the alienation of customary land rights. Ruping Ye’s analysis demonstrates how this might be achieved through the sale and purchase of customary lands. Ye’s argument is plausible, but runs counter to any intention that the Government has with the LTRA, and the possibilities allowed by the Constitution. What appears more likely is alienation by leasing, but not in the sense of leasing as an exception to the bar of alienation, but as a form of alienation itself. Leasing under the Torrens system is radically different from leasing under the Deeds system that prevailed during the constitutional formation period. Leasing under the principle of indefeasibility provides several avenues by which customary landowners may be dispossessed of their rights. When combined with the possibility for indefinite or perpetual leases, which is produced by the lax enforcement of property laws, and the possibility that lessees pay for developments on leased lands, dispossession and alienation become all the more likely. The recent effort to shore up protections against alienation, by passing the LTRAA, arguably do not address the key avenue by which this will occur, the registration of customary land leases under the Torrens system, so as to give the purchaser indefeasible title.

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<sup>80</sup> Leung Wai (2006).